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In the

Supreme Court of the United States

No. 80, October Term 1942

THE CHOCTAW NATION OF INDIANS,
Petitioner,

VERSUS

THE UNITED STATES AND THE CHICKASAW NATION.

ON PETITION OF THE CHOCTAW NATION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF OF RESPONDENT, THE CHICKASAW NATION, IN OPPOSITION.

MELVEN CORNISH,
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OPINION BELOW.

In the suit below of *The Chickasaw Nation* vs. *The United States and the Choctaw Nation,* No. K-336, in the United States Court of Claims, the judgment which the petitioner in the instant proceeding, the Choctaw Nation, seeks to have reviewed, was rendered on December 1, 1941 (R. 13-28); and judgment therein, in principle, was rendered in favor of the plaintiff, the Chickasaw Nation, and against the defendant, the Choctaw Nation,

> "* * * but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a)."

In the last paragraph of opinion of the Court of Claims (R. 27-28), it was held:

"The primary obligation being that of the defendant, the Choctaw Nation, and there being no claim that the defendant is unable to satisfy whatever judgment may be rendered, we do not consider nor decide what is the liability, if any, of the defendant, the United States."

Therefore, in the instant proceeding for a review of such judgment, the Choctaw Nation, one of the defendants below, is the sole petitioner.

JURISDICTION.

The Chickasaw Nation (the Respondent herein, and the Plaintiff in the court below), filed its suit against the United States, by authority of the Jurisdictional Act of June 7, 1924 (43 Stat., 537), and other Acts of Congress amending the same; and when, in the progress of such suit, it appeared that the Choctaw Nation was an interested party, it was, upon motion of the defendant, the United States, made a party defendant, by authority of Section 6 of said Act.

The Choctaw Nation, the petitioner herein, invokes the jurisdiction of this Honorable Court, in the instant proceeding, under Section 4 of the said Jurisdictional Act of June 7, 1924, and other acts amending the same, which authorized suits, by any one, or more, of the Five Civilized Nations or Tribes, and against the United States, and also for appeals to the Supreme Court of the United States; but that part of said act has been superseded by later Acts of Congress providing that judgments of the Court of Claims may be reviewed by the Supreme Court only upon petitions for Writs of Certiorari; and the instant proceeding arises upon the petition of the Choctaw Nation, one of the defendants below, for such a review of the said judgment of the Court of Claims.

QUESTIONS PRESENTED.

In its said decision and judgment of December 1, 1941 (R. 13-28), the Court of Claims, upon a consideration of the whole case, rendered its "Special Findings of Fact", "Conclusions of Law" and "Opinion"; and since the record in the instant proceeding is confined to the "pleading, findings of fact, judgment and opinion of the court, *but not the evidence*", there would seem to be no warrant, in this proceeding, for a reargument of the facts; but rather, it would seem that the questions arising here are: Has the Court of Claims committed errors of law in its opinion and judgment, based upon the facts so found.

In its "Special Findings of Fact" (R. 13-20), the Court of Claims sustained, in the main, the allegations and contentions of the Chickasaw Nation, the plaintiff below; and, upon the facts so found, it then also sustained its contentions upon the law, as follows:

That the Agreement, known as the Original "Atoka Agreement", entered into between the Choctaw and Chickasaw Nations and the United States on April 23, 1897, and ratified as the Amended "Atoka Agreement" (Act of Congress of June 28, 1898; 30 Stat., 495), it was agreed between the Choctaw and Chickasaw Nations (the *common owners* of the lands under consideration); that if the Chickasaw Nation would withdraw its objection, and agree that 40-acre allotments be made to the Choctaw Freedmen, the Chickasaw Nation would be compensated for its *common interest* in such lands, by a corresponding reduction of the allotments of Choctaw citizens; and that such agreement *was a binding and enforceable obligation of the Choctaw Nation*, to which it must respond; and

That when the "Supplementary" Choctaw and Chickasaw Agreement of July 1, 1902 (32 Stat., 641) come to be made, and no steps had been taken to enforce the existing obligation which the Choctaw Nation had given, and the Chickasaw Nation had accepted in the Agreement of 1898, the question arose as to when, and in what manner, the same would be redeemed; and that, in order that such question might be settled, there was drafted and agreed upon, between the Choctaw and Chickasaw Nations and the United States, and incorporated into the Agreement of 1902, a provision reaffirming the existing obligation contained in the Agreement of 1898, that the Chickasaw Nation was to receive, from the Choctaw Nation, compensation for its *common interest* in the lands allotted to the Choctaw Freedmen; and that nothing contained in the Agreement of 1902 should affect or change the same.

Therefore, as stated, the question arising in the instant proceeding are: Were errors of law committed by the Court of Claims, in rendering its said judgment of December 1, 1941, which the petitioner, the Choctaw Nation, seeks to now have reviewed, in the instant proceedings.

And, in this Brief of the Respondent, the Chickasaw Nation, in opposition to the petition of the Choctaw Nation for Writ of Certiorari to the Court of Claims, it is respectfully submitted that an examination of the Transcript of Record (R. 1-28) will disclose that no errors of law have been committed by the Court of Claims, in its said opinion and judgment of December 1, 1941; and that the petition of the Choctaw Nation should be refused.

STATUTES AND TREATIES INVOLVED.

The applicable statutes, Treaties and Agreements are set out, and cited, in the Index which precedes this Brief.

STATEMENT.

In lieu of a separate statement of the claims and contentions of the Chickasaw Nation (the Respondent here, and the Plaintiff in the court below) upon the facts and the law, reference is respectfully made to its petition filed in the court below, and made a part of the record herein (R. 1-9).

ARGUMENT.

In the Argument of the petitioner herein, the Choctaw Nation ("Points" I, II, III and IV; Petitioner's Brief, 11-12) the petitioner, the Choctaw Nation, has chosen its own arrangement of facts and law, and in this brief in opposition, there is no choice but to follow the same; and with this explanation and apology, the "Points" of petitioner's Argument will now be answered and opposed, in the order in which they occur.

"Point 1" (Petitioner's Brief, page 12), is as follows:

"The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Treaty of April 28, 1866."

Of course the Chickasaw Nation consented (along with the Choctaw Nation and the United States), that the Freedmen might receive 40 acre allotments; but *under terms and conditions which were never complied with*, and such *conditional consent* never became effective, as will be shown.

Article 3 of the Treaty of 1866 (14 Stat., 769), authorized the adoption of the Choctaw and Chickasaw Freedmen, and a *gift* to them of 40 acre allotments out of the commonly owned lands, but *provided* the legislative bodies of the two Nations favorably acted upon such adoption and allotment gift "*within two years from the ratification of this Treaty*"; and, in that event, the $300,000.00 consideration for the so called "Leased District Lands" would be paid over to the two Nations; and, upon their failure to so act, the money was to be held in trust for the benefit of the Freedmen.

The two years expired, and no action was taken; and many more years expired before the subject of adoption, and 40 acre allotments, was given any further consideration.

The suit of *United States* v. *Choctaw Nation, Chicka-*

saw Nation and Chickasaw Freedmen (193 U. S. 115-127), is decisive of what was done, and what was not done, under the Treaty of 1866, regarding the Freedmen.

In that suit, involving the rights of the Chickasaw Freedmen, under the "Supplementary" of July 1, 1902 (32 Stat., 641), the whole subject of the rights of Choctaw and Chickasaw Freedmen, *under later Agreements*, was reviewed; but the Supreme Court first made it plain that *no rights whatsoever* were ever acquired by either the Choctaw or Chickasaw Freedmen, under the Treaty of 1866.

The Supreme Court held:

> "The treaty is clear. The Indian Nations were to receive the $300,000.00 if they conferred upon the freedmen the rights expressed in the treaty. Failing to confer these rights, the sum was to be held in trust for all such freedmen, and only such freedmen as should remove from the territory. *The treaty was not complied with either by the Indians or the United States. No rights* were conferred upon the freedmen. * * *" (Italics ours.)

Following that decision, the Court of Claims then found (Finding 1; R. 15):

> "Article III was *not complied with within the two year period by either the Choctaws or the Chickasaws.* The United States did not remove any freedman pursuant to the treaty." (Italics ours.)

Then, in its opinion, the Court held (R. 21):

> The tribes did not adopt the specified legislation within the two year period and the United States did not thereafter remove the freedmen. Hence they remained with the Indians *without defined political status or property rights.* (Italics ours.)

How then, it may be inquired, can it be contended that the Choctaw Freedmen acquired rights to 40 acre allotments, out of the commonly owned lands, because of any consent of the Chickasaw Nation, contained in the Treaty of 1866?

Under the same "Point 1" (although there is not the remotest connection between the two subjects), the petitioner, the Choctaw Nation (Brief, pages 13-14), contends that by Article 26 of the same Treaty of 1866, and because of the magic of an abortive attempt of the Choctaw Nation to adopt the Choctaw Freedmen (some 15 years after the expiration of the *two year limitation* within which the Freedmen might have been given 40 acre allotments, under the Treaty of 1866, and without the consent, and over the objection, of the Chickasaw Nation, the other common owner of the lands involved), the Choctaw Freedmen were lifted from their status of Freedmen, and given full and equal rights with Choctaw and Chickasaw citizens.

The language of the said Article,

> "The *right here given to Choctaws and Chickasaws* shall extend to all persons who have become citizens by adoption or intermarriage of said Nations, or who may hereafter become such",

is stressed, and the contention is made that, because of the attempted adoption above referred to, the Choctaw Freedmen should share in *"the right here given"*.

What was *"the right here given to Choctaws and Chickasaws"*, which, by said Article 26, is passed on to citizens by adoption or intermarriage, and which the petitioner, the Choctaw Nation, contends was also passed on to the Choctaw Freedmen?

Beginning with Article 11 of the Treaty of 1866 (14

Stat., 769), and ending with Article 29, is a comprehensive and complete plan for the allotment of the commonly owned lands of the Choctaw and Chickasaw Nations among their *citizens and members and owners;* and Article 26 is merely a part of the allotment plan.

No Article in that Treaty (except Article 3) has any reference whatsoever to the Freedmen, and the possible rights which they might have acquired.

Their possible rights rose and fell, and began and ended, with the provisions and limitations of said Article 3; and, as has been shown, the Supreme Court of the United States has held that the Freedmen acquired no rights whatsoever, under that Treaty.

It may be said that the whole allotment plan (as contained in Article 11-29) also failed, and was never carried out, for reasons sufficient to the Indians and the United States, just as Article 3, relating to the Freedmen, also failed, but for reasons which the Supreme Court has made plain.

To contend that *"The rights here given to Choctaws and Chickasaws"* (to receive undivided allotment shares out of their own commonly owned lands), was passed on to the Choctaw Freedmen, because of their attempted adoption, many years later, under the conditions above set out, is, to use no stronger language, not well taken and without merit.

"Point 2" (Petitioner's Brief, page 15), is as follows:

"The Chickasaw Nation consented to allotments to Choctaw Freedmen by the Atoka and Supplementary Agreements."

Of course, the Chickasaw Nation agreed, in both the "Atoka Agreement" of 1898, and the "Supplementary

Agreement" of 1902, that the Choctaw Freedmen might receive 40 acre allotments out of the commonly owned lands of the two Nations; but, as the consideration of this agreement, the Choctaw Nation agreed that the Chickasaw Nation would be compensated for its common interest in the lands involved by a corresponding reduction of the allotments of Choctaw citizens.

Upon the record and the evidence, the Court of Claims found the facts regarding the obligation which the Choctaw Nation undertook, and which the Chickasaw Nation accepted, in the Agreement of 1898; and, also, this obligation was re-affirmed, and not altered or changed in the Agreement of 1902; which findings are as follows:

(Finding 5; R. 16):

> The original Atoka Agreement, between the Commissioners for the United States and the Choctaw and Chickasaw Nations was negotiated at Atoka, in the Indian Territory and signed on April 23, 1897. Chairman Dawes of the Commission was not present.
>
> The agreement provided for forty-acre allotments to the Choctaw freedmen and contained a provision for the reduction of the allotments of Choctaw Indian citizens on account of the allotments to Choctaw freedmen, as follows:
>
> > Provided that the lands allotted to the Choctaw freedmen, are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw tribe, so as to reduce the allotments to the Choctaws by the value of the same and not affect the value of the allotments to the Chickasaws.
>
> The Agreement contained no provision relating to allotments to the Chickasaw freedmen.

The court then found (Finding 6; R. 16-17), what transpired regarding the Chickasaw Freedmen, when the Original "Atoka Agreement" came to be amended and ratified by the Congress (Act of June 28, 1898; 30 Stat., 495):

> The agreement as ratified by the Act of Congress of June 28, 1898 (30 Stat. 495), was amended by providing for the 40-acre allotments to the Chickasaw Freedmen, but with the condition that such allotments were,
>
> > * * * to be selected, held and used by them until their rights under said treaty [the Treaty of 1866], shall be determined, in such manner as shall hereafter be provided by Act of Congress;
>
> and the provision (set out in the preceding paragraph), for the reduction of the allotments of Choctaw Indian citizens on account of allotments of the Choctaw Freedmen, was amended by providing that the allotments of Chickasaw Indian citizens be also reduced on account of allotments to the Chickasaw Freedmen, as follows:
>
> > That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribe so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

(This reference to the Chickasaw Freedmen is made only for the purpose of showing how they entered, and passed out of, "the picture"; and it should be borne in mind that what the Congress saw fit to do for them, has no relation whatsoever to the *Choctaw Freedmen*, and the obligation which the Choctaw Nation gave, and the Chickasaw Nation accepted, as the compensation of the Chickasaw Nation for its common interest in the lands involved.

As to the *Chickasaw Freedmen:* They were *given conditional allotments* of 40 acres, by the Amended "Atoka Agreement" of 1898; suit to test their rights was provided

by the "Supplementary Agreement" of 1902; and in that suit, they were held to be without rights in the lands; and the United States paid the Choctaws and Chickasaws some $600,000.00 therefor, and such moneys were paid over, in the proportion of Three-Fourths to the Choctaws and One-Fourth to the Chickasaws; and thus all questions relating to the Chickasaw Freedmen were forever settled.)

The *Chickasaw Freedmen* received their 40 acre allotments because the United States saw fit to pay the Choctaw and Chickasaw Nations therefor.

The *Choctaw Freedmen* (here involved), received their 40 acre allotments because the Choctaw and Chickasaw Nations, the common owners of such lands, saw fit to agree between themselves, and with the United States, that the Chickasaw Nation would withdraw its objections, and agree to such allotments, provided the Choctaw Nation would agree to correspondingly reduce the allotments of Choctaw citizens, as the compensation of the Chickasaws for its common interest in such lands; and that obligation was given by the Choctaw Nation, and accepted by the Chickasaw Nation, in the Agreement of 1898; and such obligation was re-affirmed, and not altered or changed, by the Agreement of 1902.

Regarding the "Supplementary Agreement" of July 1, 1902 (32 Stat., 641), the Court of Claims, upon a consideration of the record and the evidence (Finding 9; R. 19), found:

> At the time of the negotiations for the Supplemental Agreement in Washington, D. C., in February and March, 1902, the Chickasaws insisted that the agreement contain some provision saving their rights not to have allotments to Choctaw freedmen made at the expense of the Chickasaws' interest in the common-

ly owned lands. After conference with the assistant attorney general, who was legal adviser to the Department of the Interior, *it was agreed that the proviso to section 40 set out in finding 8 be included to protect their interests.* (Italics ours.)

Upon the foregoing Findings of Fact, the Court of Claims then (R. 21), in its Opinion held:

> In 1897 the United States Commission to the Five Civilized Tribes (the Dawes Commission) negotiated at Atoka, in the Indian Territory, a proposed agreement with the Choctaws and Chickasaws which provided that all tribal lands should be allotted to the Choctaws and Chickasaws, except that the Choctaw freedmen should each receive forty acres, and that the amounts of land so allotted to the Choctaw freedmen should be subtracted from the amounts which would otherwise have been allotted to the Choctaw Indians. By this arrangement the Choctaws would have been giving lands to their freedmen out of their own share, and the Chickasaws would have been making no contribution from their share of the lands.

After reciting the history of what was done, and how, to provide 40 acre allotments to the Chickasaw Freedmen and the payment therefor by the United States, the Court of Claims further holds (R. 24-27):

> The foregoing recital shows that the Chickasaws never adopted their freedmen; that their freedmen did receive allotments under the agreement of 1902, but that these allotments were paid for by the United States, and hence cost neither the Chickasaws nor the Choctaws anything; that the allotments to the Choctaw freedmen were made from the commonly owned tribal lands, and hence the Chickasaws contributed one-fourth of those allotments; that the Chickasaws have consistently claimed that neither set of freedmen should be provided with land at the expense of the Chickasaws;

that the Choctaws, in the agreement negotiated at Atoka in 1897 assented to this position by agreeing that the Choctaws should provide allotments for their freedmen by deductions from their own allotments and by omitting any provision at all for allotments to Chickasaw freedmen; that the Choctaws again, in their application to the Court of Claims in 1909 for a modification of the decree in the Chickasaw freedmen case, *desired to compensate the Chickasaws for their contribution to the allotments of the Choctaw freedmen.*

The defendants, the United States and the Choctaw Nation, assert that the Chickasaws assented, in the treaty of 1866, in the Atoka agreement as enacted by Congress in 1898, and in the supplemental agreement of 1902, to the adoption by the Choctaws of their freedmen and the allotment of land to them. Whatever may have been the power of the Choctaws, under the treaty standing alone, to make such a wholesale adoption, and give such adopted persons a share in the Chickasaws' interest in the lands, the whole history of the controversy shows that none of the parties ever so interpreted the treaty. The subject of the rights of the freedmen in the lands was a constant subject of negotiation. It was not regarded as settled, and was not settled by the treaty of 1866.

As to the Chickasaws' consenting in the Atoka agreement and the agreement of 1902 to the Choctaws' adopting their freedmen and providing them with land, there was, of course, consent. *But it was given on terms. In the Atoka agreement the terms were that the Choctaws were to provide the land for their own freedmen by subtraction from their own allotments.* As that agreement was enacted by Congress, the same provision was made for the Chickasaws, but their freedmen's allotments were made temporary and subject to further determination as their rights. *So the consent there given was no consent to a provision for the Choctaw freedmen at the expense of the Chickasaws.* (Italics ours.)

* * * * * * *

Plaintiff claims, *and we have found*, that in the negotiation for the supplemental agreement of 1902, plaintiff asserted that it should not have to contribute to the allotments for Choctaw freedmen, and that the proviso inserted in section 40 was drawn, in part, for the purpose of protecting it from that burden. The language is as follows:

> *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid. (Italics ours.)

* * * * * * *

It would have been strange for plaintiff to have, for no reason which has been suggested, yielded its position on the point of the Choctaw freedmen's allotments in 1902, after having maintained it consistently for so long. If it had so yielded in 1902, it is impossible that the Choctaws would have, in 1909, and before the litigation mentioned in the paragraph had been completed, sought to present to the Chickasaws a large sum of money in compensation for the claim, at a time when the Chickasaws were not even represented by an attorney. *We have no doubt that the Choctaws understood the proviso as we have interpreted it.*

We conclude, therefore, that *the arrangement of the Atoka agreement whereby the Choctaw freedmen were to be furnished their allotments at the expense of the Choctaws and not of plaintiff was incorporated into the supplemental agreement of 1902, as an obligation of the Choctaw Nation.* Since the Choctaw Nation is a party to this suit, having been made such pursuant to Section 6 of the Jurisdictional Act under which this suit is brought, we conclude that plaintiff is entitled to recover from the Choctaw Nation, but the determination of the amount of the recovery is reserved for further proceedings pursuant to Rule 39 (a). (Italics ours.)

Under the same "Point 2", the petitioner, the Choctaw Nation (Petitioner's Brief, R. 24), quotes Section 68 of the "Supplementary Agreement", and contends that the proviso at the end of Section 40 of that Agreement, reaffirming and saving the existing obligation of the Choctaw Nation to compensate the Chickasaw Nation for its common interest in the lands allotted Choctaw Freedmen, was *repealed* by said Section 68.

That Section is as follows:

> "No act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

But if, as found and held by the Court of Claims, the *proviso* at the end of Section 40 of the Agreement of 1902, was drafted and adopted for the definite and specific purpose of *saving and reaffirming the existing guaranty of the Choctaw Nation and the United States*, as contained in the "Atoka Agreement", how could it be inconsistent, and repealed?

"Point 3" (Petitioner's Brief, page 25), is as follows:

> **"The consent of the Chickasaw Nation to allotments of land to Choctaw Freedmen was not given on condition or express terms and no saving clause, guaranty or proviso was inserted in the Atoka or Supplemental Agreements to insure them compensation for lands so allotted."**

If, in the foregoing, it has not been shown that the "Atoka Agreement" of 1898 contained the guaranty and obligation of the Choctaw Nation to compensate the Chickasaw Nation for its common interest in the lands allotted the Choctaw Freedmen; and, if it has not also been shown

that such guaranty and obligation was saved and re-affirmed by the *proviso* at the end of Section 40 of the "Supplemental Agreement" of 1902, then any other effort to answer and oppose "Point 3" would be wholly futile.

"Point 4" (Petitioner's Brief, page 29), is as follows:

"If the Chickasaw Nation is entitled to recover any judgment rendered herein should be assessed against the United States and not the Choctaw Nation."

The respondent, the Chickasaw Nation, is willing to accept, as correct and without error, the conclusions of law of the Court of Claims (in its decision of December 1, 1941; R. 13-28), that the primary obligation to compensate the Chickasaw Nation for its common interest in the lands allotted the Choctaw Freedmen is that of the Choctaw Nation; and that judgment should be rendered accordingly.

CONCLUSION.

It is, therefore respectfully submitted that the said decision of the Court of Claims is without error; and that the petition filed herein for Writ of Certiorari should be refused.

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